Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.

DATE: July 13, 1998
CASE NO: 98-INA-005

In the Matter of:

WYSE TECHNOLOGY
Employer

On Behalf of:

SHU-HSIEN LIN
Alien

Appearance: Stanley Chao, Esq.
San Jose, CA
For the Employer and Alien

Before: Holmes, Vittone, and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. §1182 (a) (5) (1990) ("Act"). The certification of aliens for permanent employment is governed by §212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the

place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. §656.27 (c).

Statement of the Case

On January 10, 1996, Wyse Technology ("employer") filed an application for labor certification to enable Shu-Hsien Lin ("alien") to fill the position of Financial Analyst at a weekly salary of $625 (AF 59). The job duties are described as follows:

> Plan and analyze gross shipments, revenue credits, net revenue, standard margin, volume/mix, product pricing, indirect channel inventory/flow and compensation plans; plan and forecast sales expenses/programs, consolidations and foregin [sic] currency exchange. Able to review and adjust Taiwan HQ FIN report. Familiar with MIS, EXCEL and Power Point (AF 59).

The job requirements are a Bachelor's degree with one year of experience in the job offered or a Master's in Business Administration with no experience.

On December 6, 1996, the CO issued a Notice of Findings proposing to deny the labor certification. The CO found the employer in violation of §656.21 (b) (2) (i) which provides that the employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements. The job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States; and be defined in the Dictionary of Occupational Titles (DOT). Specifically, the CO objected to the employer's requirement that the incumbent possess familiarity with MIS, Excel, and Powerpoint; and the ability to adjust the company's financial report from headquarters in Taiwan. The CO relied on the fact that accountants who have experience in using computerized accounting programs or applications are not normally required to possess experience with each software package the employer has in place. The CO therefore instructed that the employer either justify these requirements as arising from business necessity or delete them altogether. The CO also determined the employer violated §656.20 (c) (8) which requires employers to document that the job opportunity has been and is clearly open to qualified U.S. workers. With regard to this finding, the CO noted that the alien had the same surname as the president of the company at Taiwan headquarters. The CO added that Applicant Malcolm T. Cleope responded in a questionnaire that the employer's criteria for assessing the qualifications of applicants was not consistent with its pay, job requirements, and duties (AF 28).

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[1] All further references to documents contained in the Appeal File will be noted as "AF."

In rebuttal, dated January 7, 1997, the employer argued that MIS, EXCEL, and Powerpoint are basic accounting programs and thus should not be considered restrictive. The employer added that due to the interaction between Wyse Taiwan and Wyse USA, it must require the ability to review and adjust the Taiwanese headquarter's financial report. The employer stated that the ability to review and adjust the financial report is only one of the job duties required and that it was not a special requirement. The employer further stated that the alien does not have any ownership interest in the company, nor is he related to anyone who has any ownership interest (AF 22).

The CO issued the Final Determination on February 11, 1997 denying the labor certification. The CO reiterated the reasons listed in the NOF and found that the employer failed to rebut the NOF issues adequately.

On March 14, 1997, the employer requested review of Denial of Labor Certification pursuant to § 656.26 (b) (1) (AF 2).

Discussion

The issues presented by this appeal are whether the requirements are unduly restrictive under §656.21 (b) (2); and whether the employer documented that the job opportunity was clearly open to qualified U.S. workers under §656.20 (c) (8).

Section 656.21 (b) (2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of §656.21 (b) (2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). A job opportunity has been described without unduly restrictive requirements where the requirements do not exceed those defined for the job in the DOT and are normally required for a job in the United States. *Ivy Cheng*, 93-INA-106 (June 28, 1994); *Lebanese Arak Corp.*, 87-INA-683 (Apr. 24, 1989) (*en banc*).

In defining the requirements for the job, experience in the job offered means experience performing the listed job duties. *Integrated Software Systems, Inc.*, 88-INA-200 (July 6, 1988). Job requirements not specified as such are deemed incorporated through the listed job duties and the requirement of experience in the "job offered." *See also Bel Air Country Club*, 88-INA-223 (Dec. 23, 1988) (*en banc*) (addressing the distinction between job duties and job requirements).

In this case, the employer required that applicants having a Bachelor's degree also possess one year of experience performing the listed job duties. Consequently, the CO objected to the requirements that applicants: (1) be familiar with the software programs MIS, EXCEL, and

Powerpoint, and (2) have the ability to review and adjust the Taiwanese headquarter's financial report.

The Board has held that a requirement characterized as "familiar with," although not impermissibly vague, can only be measured subjectively and requires strict scrutiny. *Baosu International, Inc.*, 89-INA-38 (Oct. 30, 1989). Based on the strict scrutiny standard, we find the employer failed to show the business necessity for familiarity with MIS, Excel, and Powerpoint. In rebuttal argument, the employer alleged that having a working knowledge of these programs is common in the accounting profession. However, in *Tri-P's Corp*, 87-INA-686 (Feb. 17, 1989) (*en banc*), the Board held that an employer's unsupported statement that a particular job requirement is normal for a job is insufficient in establishing that it is normally required for the job. Furthermore, the employer failed to respond to the CO's inquiry as to the amount of time needed to train an accountant in the use of these programs, particularly where that worker has experience with other accounting programs. *See In the Matter of Remax Towncenter Realty*, 96-INA-213 (Oct. 23, 1997) (the employer failed to demonstrate business necessity for restrictive requirement mandating that applicants have familiarity with accounting software). Since the employer failed to prove business necessity for this requirement, labor certification cannot be granted and further examination of the record is unnecessary.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and,**(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.